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# Supreme Court of the United States

OCTOBER TERM, 1961

No. 581

AN-SON OFFSHORE DRILLING COMPANY,
Petitioner,

*against*

HONORABLE RICHARD H. LEVET, UNITED STATES DISTRICT JUDGE FOR THE SOUTHERN DISTRICT OF NEW YORK,
Respondent.

No. 778 Misc.

AN-SON OFFSHORE DRILLING COMPANY,
Petitioner,

*against*

HONORABLE RICHARD H. LEVET, UNITED STATES DISTRICT JUDGE FOR THE SOUTHERN DISTRICT OF NEW YORK,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SECOND CIRCUIT

*and*

PETITION FOR A WRIT OF MANDAMUS OR PROHIBITION

## TEXAS SAN JUAN OIL CORPORATION'S BRIEF IN OPPOSITION

EDWARD C. KALAIDJIAN,
40 Wall Street,
New York 5, New York,
Attorney for Texas San Juan Oil Corporation

THACHER, PROFFITT, PRIZER, CRAWLEY & WOOD,
Of Counsel.

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PETITION FOR A WRIT OF MANDAMUS OR PROHIBITION

## TEXAS SAN JUAN OIL CORPORATION'S BRIEF IN OPPOSITION

### Opinions Below and Jurisdiction

The opinions of the district court denying petitioner's transfer motion and denying petitioner's application for

relief under the Interlocutory Appeals Act (28 U.S.C. § 1292(b)) are reported at 198 F. Supp. 284. The Court of Appeals rendered its order without written opinion on October 30, 1961.

This court has jurisdiction pursuant to 28 U.S.C. § 1254 and § 1651.

## Question Presented

The question presented for review may be more appropriately stated:

> Was the district court free to decide, in the circumstances presented, that no substantial reason existed for relieving the petitioner from its contractual obligation to arbitrate at the location stipulated in the charter party; or, did the federal venue statute, 28 U.S.C. §1404(a), compel the district court to transfer the arbitration of charter disputes from the place stipulated in the arbitration agreement to a different location on grounds of convenience?

As the transfer of venue pursuant to 28 U.S.C. § 1404(a) is discretionary, the writs which the petitioner seeks are scarcely an appropriate remedy.

The district court's denial of petitioner's motion for a transfer of this arbitration proceeding from the contractual forum at New York to an asserted forum of convenience at New Orleans and the subsequent concurrence therein by the United States Court of Appeals for the Second Circuit in denying petitioner's application for Writs of Mandamus or Prohibition do not conflict with any principles enunciated by this court in *Ex parte Collett*, 337 U. S. 55 (1949); *Kilpatrick* v. *Texas and Pacific R. Co.*, 337 U. S. 75 (1949); and *United States* v. *National City Lines*, 337 U. S. 78 (1949).

Those were civil actions in which venue was determined by statute or by the happenstance of the plaintiff's ability to find the defendant in the jurisdiction where suit was commenced. Unlike civil actions of that kind, arbitration may be had only by the consent of the parties and the location of the prospective arbitration is an important consideration in the granting or withholding of that consent. Consequently, the location of this arbitration proceeding is not merely a matter of venue but rather, is a substantial contract right for which the parties consciously bargained when entering into the charter.

This court has pointed out in *Bernhardt* v. *Polygraphic Co.*, 350 U. S. 198 (1956) and *Wilko* v. *Swan*, 346 U. S. 427 (1953), that commercial arbitration affords some advantages and is fraught with some risks which are not inherent in a civil action. The differences mentioned in those opinions prompted libelant to demand New York as the place of arbitration as one of the conditions for the chartering of its vessel to petitioner.

In denying petitioner's application for relief under the Interlocutory Appeals Act (28 U.S.C. § 1292(b)), the District Court correctly stated that "the question at issue does not involve any controlling principle of law." Petitioner's persistent efforts to obtain relief pursuant to the All Writs Act have already unduly delayed consideration of the disputes on their merits.

## Statement of the Case

Texas San Juan Oil Corporation, libelant* here, filed its libel in the district court on March 29, 1961 for arbitration of certain disputes which had arisen under a written bareboat charter party with petitioner dated August 12, 1959. The suit was predicated upon the United States

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* district court designation will be used throughout.

Arbitration Act, 9 U.S.C. §1 *et seq.*, and the provisions of the charter party.

By the terms of the bareboat charter party libelant let to petitioner the offshore drilling tender *Deepwater No. 1* for petitioner's use in the drilling of one or more oil wells off the coast of Louisiana. The pertinent provisions of the charter party are:

> "22. *Applicable Law.* This Bareboat Charter Party shall be deemed to be a New York contract and shall be construed and enforced in accordance with the admiralty law of the United States and, to the extent applicable, the law of the State of New York.
>
> 23. *Arbitration.* Should any dispute arise under this Bareboat Charter Party, the matter in dispute shall be referred to three persons at New York, one to be appointed by Owner, one by Charterer and the third by the two so chosen, or in default thereof, by a court of competent jurisdiction; and their decision or that of any two of them shall be final, and their award may be made a rule of court and a judgment or decree entered thereon. The Charterer and the Owner each shall bear one-half of the fees and expenses of the arbitrators."

When the parties contracted for arbitration of disputes at New York and for the construction of their contract in accordance with the admiralty law of the United States and the applicable New York law, petitioner knew:

1. that the *Deepwater No. 1* was being fitted out at a Texas shipyard to perform the charter;
2. that petitioner intended to employ the vessel for drilling in the Gulf of Mexico;
3. that petitioner would crew the vessel from that area, and

4. that upon completion of the charter, the necessary repairs to the vessel would be performed in a Gulf Coast yard.

With full knowledge of these facts, petitioner consented to arbitrate disputes at New York. Now that disputes have arisen, petitioner seeks to be relieved of its contract by resorting to the federal venue statute, 28 U.S.C. § 1404(a).

Petitioner applied to the district court for a change of venue from the Southern District of New York to the Eastern District of Louisiana. The basis of petitioner's application was the convenience of witnesses, libelant's as well as petitioner's. In a memorandum decision and order dated September 7, 1961, the district court (Levet, J.) denied petitioner's application on the grounds that petitioner had shown no substantial reason why it should be relieved of its contractual undertaking to arbitrate at New York. Petitioner then applied to the court to certify its decision for interlocutory appeal pursuant to the provisions of 28 U.S.C. § 1292(b). That application was denied by the court in a written memorandum dated September 21, 1961.

The district court's denial of the petitioner's transfer motion and the Court of Appeals' denial of petitioner's application for Writs of Mandamus or Prohibition have had no more drastic effect than to subject the petitioner to arbitration at the location stipulated in petitioner's contract with libelant.

## ARGUMENT

### 1. The All Writs Act affords petitioner no remedy.

The All Writs Act (28 U.S.C. § 1651) was not intended as a vehicle for the judicial review of interlocutory, discretionary orders, not otherwise reviewable.

Most nearly pertinent is the decision of this court in *Bankers Life & Casualty Co.* v. *Holland*, 346 U. S. 379 (1953), holding that mandamus is not a proper remedy to vacate a severance and transfer order entered by a district court on the ground of improper venue under 28 U.S.C. § 1406(a). In its decision the court reiterated that the extraordinary writs may not be employed as substitutes for appeals even though the order sought to be vacated might be a cause of inconvenience or hardship. If the district court and the Court of Appeals had erred in their denial of the relief which petitioner sought, and they did not, the asserted error would not justify the issuance of an extraordinary writ at petitioner's behest.

*Parr* v. *United States*, 351 U. S. 513 (1956).

This court has stated in *Bankers Life & Casualty Co.* v. *Holland*, 346 U. S. 379 at pages 382-383, that the use of the extraordinary writs is limited to cases of "usurpation of judicial power", typified by *DeBeers Consolidated Mines* v. *United States*, 325 U. S. 212 (1945), to cases involving the abuse of judicial power and to cases where a court has exceeded or refused to exercise its jurisdiction.

*LaBuy* v. *Howes Leather Co.*, 352 U. S. 249 (1957);
*Parr* v. *United States*, 351 U. S. 513 (1956);
*Roche* v. *Evaporated Milk Association*, 319 U. S. 21 (1943).

A careful reading of the decisions in *Arrowhead Co.* v. *The Aimee Lykes*, 2 Cir., 193 F. 2d 83, 84 (1951); *Ford Motor Co.* v. *Ryan*, 2 Cir., 182 F. 2d 329 (1950), and *Magnetic Engineering & Manufacturing Co.* v. *Dings Manufacturing Co.*, 2 Cir., 178 F. 2d 866 (1950), cited at page 12 of the petition herein, discloses that the United States Court of Appeals for the Second Circuit does not counte-

nance the charitable use of the extraordinary writs which the petitioner expounds.

> *Lykes Bros. Steamship Co.* v. *Sugarman*, 2 Cir., 272 F. 2d 679 (1959).

Petitioner failed to meet its burden of establishing a "clear and indisputable" case for relief under the All Writs Act.

> *Bankers Life & Casualty Co.* v. *Holland*, 346 U. S. 379, 384-385.

Petitioner's posture before this court is accurately characterized by the decision of the United States Court of Appeals for the Third Circuit in *All States Freight* v. *Modarelli*, 3 Cir., 196 F. 2d 1010, at page 1012:

> "Every litigant against whom the transfer issue is decided naturally thinks the judge was wrong. It is likely that in some cases an appellate court would think so, too. But the risk of a party being injured either by the granting or refusal of a transfer order is, we think, much less than the certainty of harm through delay and additional expense if these orders are to be subjected to interlocutory review by mandamus."

Petitioner's persistent attempts to obtain relief pursuant to the All Writs Act (28 U.S.C. § 1651), to which it is not entitled, have already delayed the parties a number of months in getting to the merits of the charter disputes between them and have occasioned unnecessary expense.

## 2. The location of this arbitration proceeding is not transferable.

Implicit in argument (b) at page 8 of the petition is the syllogism:

> Any proceeding of a non-criminal nature is a civil action transferable pursuant to 28 U.S.C. § 1404(a);

> arbitrations are non-criminal in nature; ergo, arbitrations must be transferable as any other civil action.

Petitioner's syllogism is a blooming example of the fallacy of the undistributed middle term. Characterizing an arbitration proceeding as a "civil action", as petitioner has done in reliance on *Marchant* v. *Mead-Morrison Manufacturing Co.*, 2 Cir., 29 F. 2d 40 (1928), does not contribute to the resolution of the problem. As Judge Medina has said in *Robert Lawrence Company* v. *Devonshire Fabrics, Inc.*, 2 Cir., 271 F. 2d 402 (1959), at pages 407-408:

> "Mere catchwords, labels and cliches no longer smooth the path of justice as they so often did in the past. As noted above, arbitration has often been described as pertaining to the law of remedies, but this tendency is losing much of its fascination in these modern times."

The concept, implicit in petitioner's argument, that arbitration is merely a form of trial to be used in lieu of a trial at law, typified by such decisions as *Murray Oil Products Co.* v. *Mitsui & Co.*, 2 Cir., 146 F. 2d 381 (1944), and *American Locomotive Co.* v. *Chemical Research Corporation*, 6 Cir., 171 F. 2d 115 (1949), has been rejected by this court in *Bernhardt* v. *Polygraphic Co.*, 350 U. S. 198 (1956), at pp. 202-203, and *Wilko* v. *Swan*, 346 U. S. 427 (1953), at pp. 435-438. These decisions instruct that arbitration may not be passed off simply as the equivalent of a judicial reference but has its own distinguishing features peculiar to its function as an implement for the resolution of commercial disputes. Thus arbitrators are without judicial instruction on the law. They need make no explanation of the reasons for their decision, nor are they required to keep a complete record of their proceedings. Their decisions need not take into account such well defined judicial standards as "burden of proof," "reasonable care" or "material fact." The scope of review of their decisions is most limited. There is at least some

authority that the Federal Rules of Civil Procedure providing for discovery in "civil actions" have no applicability to arbitrations.

> *Foremost Yarn Mills, Inc.* v. *Rose Mills, Inc.* (E. D., Pa.), 25 F.R.D. 9 (1960);
> *Commercial Solvents Corp.* v. *Louisiana Liquid F. Co.* (S. D., N. Y.), 20 F.R.D. 359 (1957).

These enumerated differences between the garden variety civil action and an arbitration proceeding unquestionably explain the most fundamental of all distinctions between them, i.e., that arbitration may be had only by the consent of the parties.

Mindful of these essential differences and the risks and advantages which they entailed, libelant contracted with petitioner for the arbitration of charter disputes at New York as a condition to petitioner's hiring of its vessel. As New York is a leading center for arbitration and maritime law, libelant deemed that arbitration of disputes here would minimize the risks inherent in the procedure.

Petitioner's consent to arbitrate disputes with libelant at New York was valid and irrevocable except upon the grounds specified in the Arbitration Act, 9 U.S.C. § 2. The convenience of witnesses does not relieve petitioner from its contract under the Federal Arbitration Act or the New York Arbitration Law. C.P.A. § 1448.

As to the enforceability of a stipulation to arbitrate at a definite place, some guidance may be derived from the decision of New York Court of Appeals in *Matter of Amtorg Trading Corporation* (*Camden Fibre Mills*), 304 N. Y. 519 (1952). The court declined to relieve an American corporation of a commercial contract stipulation providing for arbitration in Moscow. At page 521 of its opinion, the Court of Appeals stated:

> "We also agree with the Appellate Division's disposition of the remaining issues. Camden chose to

do business with Amtorg and to accept, as one of the conditions imposed, arbitration in Russia; it may not now ask the courts to relieve it of the contractual obligation it assumed."

The United States Court of Appeals for the Second Circuit recently upheld the enforceability of a contractual stipulation as to the venue of an action on a bill of lading in *William H. Muller & Co.* v. *Swedish American Line, Ltd.*, 2 Cir., 224 F. 2d 806 (1955).

The case of *Continental Grain Co.* v. *Dant & Russell*, 9 Cir., 118 F. 2d 967 (1960), cited at footnote 5 of petitioner's brief is not authority for applying the federal venue statute to arbitration proceedings. Although the charter in that case stipulated the arbitration of disputes in New York, the libelant petitioned the court in Oregon for arbitration pursuant to § 4 of the Federal Arbitration Act which specifies that arbitrations must proceed in the district where the petition for arbitration is filed. The *Continental Grain* case may be explained as a waiver by the libelant in bringing suit elsewhere. No waiver exists in this case.

Petitioner's venue application also offends the principle in arbitration that once a contract to arbitrate has been established, all issues in the proceeding are for the arbitrator.

*Matter of Exercycle Corp.* (*Maratta*), 9 N. Y. 2d 329 (1961).

". . . The role of the court on a motion to compel or stay arbitration is always cropping up in commercial arbitration cases. It has repeatedly been held that a court faced with such an application is not concerned with the merits of the dispute itself, but that only three questions are before it: Whether there is a written contract to arbitrate, whether the dispute between the parties is covered by the arbitration

clause, and whether there was a failure to proceed with the obligation to arbitrate. Every other issue in the proceeding is for the arbitrator." 36 New York University L. R. 545, 556-557.

The decision in *Foremost Yarn Mills, Inc.* v. *Rose Mills, Inc.* (E. D., Pa.), 25 F.R.D. 9 (1960), suggests that the power of the courts to regulate arbitrations is limited to those contained in specific sections of the Arbitration Act. If, as the court there concluded, the Arbitration Act does not regulate the procedures before the arbitrators or prescribe rules or regulations for the conduct of hearings before arbitrators, it may be safely assumed that the federal venue statute, 28 U.S.C. § 1404(a) was never intended to be engrafted upon arbitration proceedings. If the court holds that arbitrations may be transferred away from their agreed location on grounds of convenience, it will introduce the mischief of "forum shopping" into a system which was conceived for the expeditious and inexpensive resolution of commercial disputes, thereby impairing its efficacy.

The case of *Continental Grain Co.* v. *Barge FBL-585*, 364 U. S. 19 (1960), cited by petitioner at page 13 of its brief is inapposite. The court was not concerned with an arbitration at all; nor was there any question of the transferability of a civil action away from a place where the parties had agreed to conduct it. The decision was a logical means of avoiding separate trials by two different courts of the same issues.

Libelant regards the agreed location of this arbitration at New York as a contract right of the kind mentioned by Judge Dimock in *Schilling* v. *Canadian Foreign Steamship Company*, 190 F. Supp. 462 (1961), at page 463:

> "The right of a party to a contract to resort to arbitration provided for in that contract is as much a contract right as is the right to payment. . . ."

## CONCLUSION

**The petitions for a writ of certiorari and for a writ of mandamus or prohibition should be denied.**

EDWARD C. KALAIDJIAN,
Attorney for
Texas San Juan Oil Corporation.

THACHER, PROFFITT, PRIZER,
CRAWLEY & WOOD,
Of Counsel.

December 27, 1961.